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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE FLORES, Defendant and Appellant.	E046761 (Super.Ct.No. RIF141747) OPINION

APPEAL from the Superior Court of Riverside County. Garrett W. Olney, Judge. (Retired judge of the Plumas Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-

Ladendorf, and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Flores appeals a conviction for vehicular manslaughter and failing to stop after being involved in an accident resulting in injury, in which he was the driver. He contends that his conviction must be reversed because of prosecutorial misconduct, instructional error and error in the admission of evidence of uncharged misconduct, or because of the cumulative effect of all three errors. Finding no prejudicial error, individually or cumulatively, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Michael Collier was killed on March 17, 2007, when the vehicle in which he was riding was struck by a white truck which ran a red light. Collier was ejected from the vehicle and died from blunt force injuries.

The driver of the white truck fled the scene on foot after having been helped out of the truck by a mother and daughter, Hadra and Ireina Lemos, who came upon the scene shortly after the collision occurred. Both stated that they smelled alcohol on the driver and that the driver's right foot was injured. Nevertheless, the driver was able to run from the scene a few minutes later.

The white truck was registered to German Melendez. Melendez and his wife, Gracia Heredia, produced a bill of sale showing that they sold the truck to "Jose Paz" in February 2007. California Highway Patrol Officer David Yokley, the investigator assigned to the case, attempted to locate the address the buyer had written on the bill of

sale, but the street number did not exist. Yokley searched both public records and records available to law enforcement and discovered a person who used both the name "Jose Paz" and the name "Jose Flores Paz." He obtained a photograph of Jose Flores Paz from the Department of Motor Vehicles. Latent fingerprints lifted from the truck did not match those of Jose Flores Paz, however. No match to any of the latent prints was found.

Yokley prepared a photo lineup, using defendant's "most recent" booking photo. Gracia Heredia testified that she identified defendant's photo as the one "most similar" to the buyer of the truck. She testified that the photograph was not of the buyer but was like him, except that the buyer had shorter and curlier hair. Ireina Lemos, who had assisted the driver of the truck at the scene, identified defendant's photograph as the driver. One of the things she remembered about the driver was that he had "longer" hair which was somewhat messy. Defendant was the only person in the lineup who had long hair. However, Ireina did not instantly select defendant's photograph; she first considered the possibility that another person in the lineup was the person she saw.

Defendant was not located until March 22, 2008, a year after the accident, when he was arrested at the Pechanga Resort and Casino for possession of methamphetamine. Casino security received a call concerning a man "smoking substance" (*sic*) in a car parked in the casino parking lot. Security contacted defendant, who identified himself as Jose Flores Paz, and asked him to get out of the car. After defendant gave his consent, the security officer searched the car. He found two pieces of foil, one with burn marks and one with a white residue. The residue tested positive for methamphetamine. A glass

pipe of a type commonly used for smoking methamphetamine had been found in the white truck when it was inventoried after the accident.

Defendant's defense was that he was not the person who was driving the truck. He challenged the validity of the photo lineup. He also presented testimony of his former employer, Jack Fields, the owner of a dry cleaning shop, who testified that defendant came to work the day after the accident. Fields testified that defendant had no difficulty working and being on his feet all day and that he gave no indication that he had an injury to his foot. Fields also testified that although he always saw his employees drive into the parking lot before work, he never saw defendant driving a white truck.

Defendant was charged with failing to stop after being a driver involved in an accident resulting in injury (Veh. Code, § 20001, subd. (a); count 1) and misdemeanor vehicular manslaughter (Pen. Code, § 192, subd. (c)(2); count 2). The information also alleged that the Vehicle Code violation resulted in permanent and serious injury to the victim. (Veh. Code, § 20001, subd. (b)(2).) A jury found him guilty on both counts and found the permanent and serious injury allegation true.[1] The court imposed the middle term of three years on count 1 and a concurrent term of one year on count 2.

Defendant filed a timely notice of appeal.

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[1] Vehicle Code section 20001, subdivision (b)(1) provides that a violation of subdivision (a) is punishable by imprisonment in state prison or in a county jail for not more than one year. Subdivision (b)(2) provides that if the accident resulted in death or permanent serious injury, the violation is punishable by two, three or four years in state prison.

LEGAL ANALYSIS

DEFENDANT WAIVED ANY CLAIM OF PROSECUTORIAL MISCONDUCT

As described above, Officer Yokley used a booking photograph of defendant in the photo lineup. Before trial, defense counsel asked the court to exclude any reference to booking or arrest records or prior arrests. The court agreed that such references would be inappropriate and stated that it did not "anticipate" that the prosecutor would elicit such testimony. The court stated that it was "sure" the prosecutor would talk to his witness in order to avoid such testimony. The prosecutor stated, "I will." Nevertheless, Officer Yokley testified that he used defendant's "most recent" booking photograph in the lineup. He further testified that "[t]here was another booking photo but it was pretty poor quality."

Defense counsel did not object in either instance; nor did he seek an admonition to the witness when he first testified that the source of the photos was a website which contains all driver's license photos and all booking photos. After the court sustained a hearsay objection to a question concerning information Yokley might have obtained from defendant's uncle as to defendant's whereabouts, defense counsel requested a sidebar. During the sidebar, defense counsel stated his concerns about the prosecutor having elicited from Yokley the information that defendant's booking photo was used to create the lineup. When questioned by the court about it, the prosecutor admitted that he had not instructed Yokley to avoid references to defendant's arrests. The court offered to

give a curative instruction, but defense counsel declined. Defendant now contends that this was prosecutorial misconduct which requires reversal of his conviction.

"It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Although the court phrased its direction to the prosecutor to instruct his witness not to allude to booking or arrest records or arrests in a polite manner, it was clearly an order. The Attorney General contends that there is no indication in the record that the prosecutor intentionally violated the order. However, "Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct." (*Ibid*.) Consequently, even if it is true that the prosecutor did not deliberately elicit the testimony, his failure to instruct the witness in accordance with the court's order in order to avoid the anticipated inappropriate testimony was misconduct.

Nevertheless, defendant has forfeited any claim of prosecutorial misconduct because his attorney expressly declined the court's offer to admonish the jury. (*People v. Valdez* (2004) 32 Cal.4th 73, 124-125.) In order to preserve a claim of prosecutorial misconduct for review, a defendant must both make a timely objection and request a curative admonition. An objection and/or a request for an admonition is excused only if either would be futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Testimony concerning a criminal defendant's prior arrests is not so inherently prejudicial that an

admonition would not cure its effect. (See *People v. Jennings* (1991) 53 Cal.3d 334, 375.) Moreover, it is "only in the exceptional case" that an admonition will not cure the effect of improper prejudicial evidence. (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.) Defendant has failed to demonstrate that the implication that he had suffered prior arrests was "so grave that a curative instruction would not have mitigated any possible prejudice." (*People v. Valdez, supra*, at p. 125.) Accordingly, the issue was not preserved for appeal.

THE ADMISSION OF EVIDENCE OF DEFENDANT'S SUBSEQUENT POSSESSION OF METHAMPHETAMINE, EVEN THOUGH ERRONEOUS, WAS NOT PREJUDICIAL

Over defendant's objection, the court admitted evidence that defendant was arrested for possession of methamphetamine at the Pechanga casino one year after the hit and run incident. The court determined that the evidence was probative as to defendant's identity as the driver of the white truck because a pipe used to smoke methamphetamine was found in the white truck after the accident. The court concluded that defendant's possession and use of methamphetamine in his car and possession of a pipe used to smoke methamphetamine by the driver of the truck involved in the accident was circumstantial evidence which had a tendency in reason to prove that defendant was the

driver of the truck.[2] Although the court considered it a close call, it determined that the probative value of the evidence outweighed its potential prejudice.

The Attorney General characterizes defendant's argument as a contention that the court abused its discretion in admitting the evidence because its probative value did not outweigh its prejudicial effect. However, defendant's actual argument is that the evidence was not admissible because it failed to meet the criteria for the admission of evidence of uncharged misconduct to prove identity.

Evidence Code section 1101 (hereafter section 1101, or where appropriate, section 1101(b)) prohibits evidence of an instance of a person's conduct to prove his or her conduct on a specific occasion. (§ 1101, subd. (a).) Subdivision (b) of that statute provides, however, that evidence that a person committed "a crime, civil wrong, or other act" is admissible "when relevant to prove some fact (such as . . . identity . . .) other than his or her disposition to commit such an act." (§ 1101(b).)

This is not the classic section 1101(b) scenario, in which the prosecution attempts to prove the defendant's identity as the perpetrator with evidence of a similar crime. (See, e.g., *People v. Hovarter* (2008) 44 Cal.4th 983, 1001-1005 (*Hovarter*).) Here, it is not the similarity of the charged and uncharged offenses which is relevant to prove defendant's identity as the driver of the truck. Rather, it is the asserted similarity of a

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[2] Defendant did not challenge the testimony of the prosecution's drug expert that this pipe was of a type commonly used to smoke methamphetamine. The expert did not explain why the pipe could not have been used to smoke other types of drugs, such as marijuana.

circumstance associated with the charged offense, i.e., the presence of a methamphetamine pipe in the truck which was involved in the hit and run, and the uncharged offense of possession of methamphetamine. Nevertheless, it does involve the use of an uncharged felony to prove defendant's identity as the hit and run driver in a second, unrelated offense. We conclude that the court abused its discretion in admitting the uncharged offense for this purpose because it failed to apply the analysis which our Supreme Court has established for use in determining whether evidence of an uncharged offense is admissible to prove identity and because the necessary distinctiveness is lacking.

Although we review a trial court's ruling under section 1101(b) for abuse of discretion (*Hovarter*, *supra*, 44 Cal.4th at p. 1003), we do so by determining whether the court applied appropriate criteria in determining the admissibility of this evidence: Judicial discretion is "the sound judgment of the court, to be exercised according to the [applicable] rules of law." (*Lent v. Tillson* (1887) 72 Cal. 404, 422.) "The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action . . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297; accord, *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393.)

Because evidence that a criminal defendant committed another, uncharged offense may be highly inflammatory, its admissibility is to be scrutinized with great care. (*Hovarter, supra,* 44 Cal.4th at p. 1002.) For purposes of proving identity, admissibility of the evidence of the uncharged offenses depends on proof that the charged and uncharged offenses share common features that are both substantially similar and "sufficiently distinctive so as to support the inference that the same person committed both acts." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) "'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*Ibid*.) "'"The highly unusual and distinctive nature of both the charged and [uncharged] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." [Citation.]' [Citation.]" (*Hovarter*, at p. 1003.)

Here, the court considered only the probative value of the evidence relative to its potential prejudice. It did not consider the threshold requirements of substantial similarity and a high level of distinctiveness of the conduct. Even if it had, however, we would conclude that it abused its discretion, because driving a car containing a methamphetamine pipe, or drug paraphernalia in general, and smoking methamphetamine while sitting in a parked car are not acts which are so "'"highly unusual and distinctive"'" as to "'"virtually eliminate[] the possibility that anyone other than the defendant committed the charged offense." [Citation.]' [Citation.]" (*Hovarter, supra,* 44 Cal.4th at p. 1003.) On the contrary, both are unfortunately common occurrences. Accordingly,

the evidence of the uncharged offense simply does not meet the standard for admissibility under section 1101(b).

The next question is whether the erroneous admission of the uncharged offense requires reversal of defendant's conviction. We conclude that it does not.

Errors in the admission of section 1101(b) evidence are reviewed on appeal under the standard of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*People v. Cole* (2004) 33 Cal.4th 1158, 1195 (*Cole*).)[3] Under that standard, reversal is required only if there is a reasonable probability that the outcome would have been more favorable to the defendant

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[3] Defendant contends that the admission of this evidence violated his due process trial rights under the Fourteenth Amendment. He contends that in *Cole, supra,* 33 Cal.4th 1158, and in *People v. Lindberg* (2008) 45 Cal.4th 1 (*Lindberg*), the California Supreme Court applied the harmless error standard applicable to constitutional violations (*Chapman v. California* (1967) 386 U.S. 18) to the erroneous admission of evidence subject to section 1101(b). We disagree. In *Lindberg*, the court expressly rejected the contention that error in admission of such evidence violated the defendant's constitutional rights: "We have long observed that '[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights.' [Citation.]" (*Lindberg*, at p. 26.) As in *Lindberg*, "[d]efendant fails to persuade us [that] his case presents an exception to this general rule." (*Ibid*.) The court went on to assess the error under the *Watson* standard. It then observed that the error was also harmless beyond a reasonable doubt under the *Chapman* standard. (*Lindberg*, at p. 26.) In *Cole*, the court first applied *Watson* and then observed that the error was also harmless beyond a reasonable doubt, in response to the defendant's argument that the error was of constitutional dimension, an argument the court rejected. (*Cole*, at p. 1195 & fn. 6.)

People v. Dykes (2009) 46 Cal.4th 731, on which defendant also relies, involves the use of victim-impact testimony in the penalty phase of a capital trial. There, the court held that such testimony is admissible "'[u]nless it invites a purely irrational response from the jury . . . .' [Citations.]" (*Id*. at p. 781.) Only if it does invite such a response does the evidence render the trial fundamentally unfair, in violation of the due process clause of the Fourteenth Amendment. (*People v. Dykes, supra*, at p. 781.) Although it is conceivable that the erroneous admission of section 1101(b) evidence could in some cases be so inflammatory as to violate due process, defendant has not, as we noted above, persuaded us that this is such a case. (*Lindberg, supra*, 45 Cal.4th at p. 26.)

in the absence of the error. (*Watson*, at p. 836.) A reasonable probability does not mean more likely than not; it means merely "a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [italics omitted]; see also *Strickland v. Washington* (1984) 466 U.S. 668, 694 ["A reasonable probability [that the outcome would have been different in the absence of the error] is a probability sufficient to undermine confidence in the outcome."].)

Defendant contends that the error meets the *Watson* standard because the rest of the evidence was contradictory and uncertain. However, the evidence was by no means as weak as defendant asserts. Ireina Lemos identified defendant in court and stated that she was "most positive" that he was the driver. She had spent about five minutes talking to him at the scene of the accident. The lighting was adequate, and she could see his face clearly. She testified that she selected defendant's photograph (No. 4 in the lineup) because she was sure he was the driver. Even though defendant was the only person depicted in the lineup who had long hair, Ireina did not instantly select defendant's photograph. She examined all of the photographs and considered the possibility that another person shown in the lineup was the person she saw at the accident scene. She also did not reject other photographs merely because the individuals depicted had short hair; in particular, she testified that she rejected No. 1 not because of his hair but because she had never seen him before. And, contrary to defendant's contention, the fact that defendant's former employer testified that defendant was at work the morning after the accident and displayed no sign of injury does not directly contradict the testimony of

Hadra and Ireina Lemos that the driver injured his foot in the accident: Ireina testified that he was able to run away minutes later and did not appear to be impeded by his injury. Consequently, there is no compelling evidence that defendant would not have been able to work the next day or that he would have had a noticeable injury. In addition, the jury was instructed that if it concluded that defendant committed the uncharged offense, that conclusion alone was not sufficient by itself to prove defendant's guilt but was only one factor to consider along with all the other evidence to determine whether defendant's guilt was proven beyond a reasonable doubt.

For both of those reasons, we conclude that it is not reasonably probable that the outcome of the trial would have been more favorable to defendant in the absence of the evidence of his subsequent possession of methamphetamine. (*Cole, supra*, 33 Cal.4th at p. 1195.)

THE OMISSION OF CALCRIM NO. 224 DOES NOT REQUIRE REVERSAL

Defendant contends that the court's failure to instruct with CALCRIM No. 224 on the sufficiency of circumstantial evidence requires reversal.

CALCRIM No. 224 states: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or

more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable." CALCRIM No. 224 is substantially identical to its predecessor, CALJIC No. 2.01. Consequently, authorities discussing the CALJIC instruction apply to the current instruction as well. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1171, fn. 12.)

The trial court is required to instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The subject matter of CALCRIM No. 224 is such a principle, and it must be given, sua sponte or on request, on those occasions when it is applicable. (*People v. Wiley* (1976) 18 Cal.3d 162, 174; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.)

Here, as defendant points out, although the instruction was on the list of selected instructions, the court omitted it from its reading of instructions and from the packet of written instructions given to the jury. However, CALCRIM No. 224 is not necessary unless the prosecution substantially relies on circumstantial evidence to prove its case. (*People v. Anderson* (2001) 25 Cal.4th 543, 582; *People v. Yrigoyen, supra*, 45 Cal.2d at p. 49; Bench Notes to CALCRIM No. 224.) Where the prosecution does not substantially rely on circumstantial evidence but instead uses it only to corroborate direct evidence, omission of the instruction is not prejudicial. (*People v. Yeoman* (2003) 31 Cal.4th 93, 142.)

Here, the prosecution relied primarily on direct evidence, i.e., Ireina Lemos's identification of defendant as the driver. The circumstantial evidence, although important, was essentially corroborative. Even if that were not the case, however, defendant has not explained why, if the instruction had been given, there is a reasonable probability that the jury would have concluded that the circumstantial evidence was equally consistent with the conclusion that he was not guilty. Accordingly, defendant has not met his burden of demonstrating a reasonable probability that the outcome would have been more favorable to him if the instruction had been given. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

DEFENDANT HAS FAILED TO SHOW CUMULATIVELY PREJUDICIAL ERROR

Defendant contends that even if the errors he asserts were not individually prejudicial, cumulatively they require reversal. He contends that because the alleged prosecutorial misconduct is reviewed under the *Chapman* standard, the claim of cumulative error must also be assessed under that standard.

Because we have concluded that only the admission of the evidence subject to section 1101(b) was error, or at least that it was the only error preserved for review, we need not address this contention.

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ Hollenhorst
J.